IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 16, 2008

IN RE ESTATE OF LAURA MAE ELDRIDGE McGLOTHIN

Appeal from the Probate Court for Roane County
No. P-2104 Jeff Wicks, Judge

No. E2007-01749-COA-R3-CV - FILED SEPTEMBER 30, 2008

Laura Mae Eldridge McGlothin ("the Decedent") was the paternal grandmother and later the adoptive mother of Jonathan McGlothin ("Son"). Because of the inability of the Decedent and Son to get along, the Decedent sent Son to live with Donald Collett and his wife, Anna Collett. When Son was sent to live with them, he was receiving social security benefits as a result of the death of his adoptive father. After the Decedent died, Son and the Colletts filed separate claims against the Decedent's estate claiming that the Decedent improperly retained Son's social security benefits, which federal law required the Decedent to use for the care and maintenance of Son. Following a trial, the court awarded the Colletts a judgment in the amount of $5,862, and Son a judgment in the amount of $10,238. The estate appeals, raising various issues. We modify so much of the judgment as pertains to the award to Son. As modified, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court, as Modified, is Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, and SHARON G. LEE, JJ., joined.

Browder G. Williams, Kingston, Tennessee, for the appellant, Estate of Laura Mae Eldridge McGlothin.

Gerald Largen, Kingston, Tennessee, for the appellee, Jonathan McGlothin.

Greg Leffew, Rockwood, Tennessee, for the appellees, Donald R. Collett and Anna F. Collett.

OPINION

I.

This appeal involves two claims against the estate of the Decedent. She died on November 14, 1995, at the age of 83. At the time of her death, she had four surviving adult children – two daughters and two sons. A petition for probate of her will was filed one week after the Decedent's death. The petition states that the total value of the Decedent's estate was approximately $100,000. As relevant to this appeal, the Decedent's will provides as follows:

> Not being unmindful of my children . . . , I leave them nothing by this instrument, it being my express desire that they take nothing from my estate. . . .
>
> I will, devise and bequeath all of my estate of every kind and nature and wherever situated to the following, equally, share and share alike:
>
> A. Tennessee Services for the Blind, an agency of the Tennessee Department of Human Services, to pay for purchases and services for the blind for which funds are not appropriated.
>
> B. Heart Disease Research Foundation.
>
> C. American Diabetes Association.

The Decedent's oldest son is Everett McGlothin. He and his former wife, Judy McGlothin, are the biological parents of Son. When Everett and Judy McGlothin divorced in 1977, they agreed that the Decedent and her husband would have custody of Son. The Decedent and her husband eventually adopted Son, although the record does not indicate when the adoption occurred.

The Decedent and Son did not get along; apparently there was constant turmoil between them. In the spring of 1991, the Decedent sent Son to live with the Colletts, who the Decedent knew through the church. Son continued to live with the Colletts until after he turned 18 on November 12, 1993. Because of the death of Son's adoptive father, he became the beneficiary of monthly social security checks. While Son was living with the Colletts, those checks were sent to the Decedent, who allegedly offered little financial assistance to either Son or the Colletts.

In May 1996, Son filed a claim against the Decedent's estate. According to Son's handwritten claim, it was being brought

> [t]o recover the moneys collected by decedent for the ostensible purpose of support and maintenance of claimant, but which was not so expended but instead retained by her.
>
> The amount of this claim has not been calculated exactly and may well require evidentiary proceedings to determine the exact amount.

The crux of Son's claim is that the checks sent by the Social Security Administration for his benefit were sent to the Decedent only because Son was under the age of 18. Son claims that the money actually was his and the Decedent was required to use those funds for his care, which he claims she did not do. Son sought from the Decedent's estate an amount equal to the social security funds that she, according to Son, improperly retained.

The Colletts also filed a claim against the Decedent's estate. The Colletts claimed that even though they agreed to care for Son, the Decedent had a legal obligation to assist financially in his care since the Decedent was legally Son's mother. The Colletts sought from the Decedent's estate an amount in excess of $12,000, representing funds the Colletts allegedly spent on Son during the time he lived with them up until he turned 18. As indicated, the claim filed by the Colletts exceeded $12,000. However, the claim that is contained in the trial court's file indicates that there was an "unpaid balance" of $5,862. Mr. Collett asserted at trial that the claim which he filed with the probate court did not contain a reference to an "unpaid balance" and that the majority of the claim remained unpaid. At trial, Patricia Blanchard, a former employee of the Clerk and Master's office, testified that she was the one who wrote on the Colletts' claim that there was an unpaid balance of $5,862. Since it had been 11 years between the time the claim was filed and trial, Blanchard could not remember what lead her to write on the claim that there was an unpaid balance of $5,862. All Blanchard could offer was that she "wouldn't have made that up. I'd have to have a reason for it to be there."

A bench trial was conducted on June 12, 2007.[1] The first witness was Wilma Brummett, who knew the Colletts and the Decedent for many years. According to Brummett, after the Decedent's husband passed away, the Decedent told Brummett that she was going to "get rid of " Son and "give him away." The Decedent asked Brummett if she would allow Son to live with her. After speaking with her husband about the situation, Brummett declined. According to Brummett:

> [W]hen we did not agree to take him, I called her and told her so. And she said, "Well," she said, "I will get rid of him." And so I said, "Well, just wait."
>
> So I went to our minister, because John, at that time, was going to our church, and I explained to the minister about what was going to happen. I said, "She will get rid of him. She will send him to juvenile detention or somewhere." And so I was so concerned and it worried me. . . . I said, "Maybe somebody in our church will, you know, take him and take care of him for awhile."
>
> And at that time, [the minister] talked about doing it, but then [Mr. and Mrs. Collett] decided they would take him in.

[1] All four of the Decedent's children challenged the validity of the Decedent's will for various reasons. The challenge ultimately was unsuccessful. The ruling as to the validity of the will is not at issue on this appeal.

On cross-examination, Brummett acknowledged that when she had this conversation with the Decedent, who by that time was legally blind, that the Decedent and Son were "constantly" arguing. Brummett also testified that when the Decedent asked her to take care of Son, the Decedent did not offer to pay Brummett for Son's care.

The next witness was Donald Collett. Mr. Collett testified that Son lived with them for approximately three years. Son initially came under their care in the spring of 1991, and stayed until after he graduated from high school in 1994. Mr. Collett acknowledged receiving some checks from the Decedent to assist with Son's care. However, Mr. Collett claimed that he always gave that money directly to Son.[2] Regarding the claim that was filed with the probate court, Mr. Collett testified that he did not know who, incorrectly according to him, put on the claim that there was an unpaid balance of $5,682.

One of the items listed on the Colletts' claim is $1,620 for school lunches for a three-year period. Mr. Collett testified that the specific dollar amount was provided to him by an employee of the school system.[3] In addition, he stated that the school also provided him the amount that was paid for lab fees, driver's education, art supplies, and attendance at school events like football games, the prom, class ring, etc. The total amount of payments listed on the claim form for Son's time in high school was $2,950.

Mr. Collett testified that he included in his claim against the estate an amount of $6,200 for room and board. Mr. Collett stated that he and his wife provided Son three meals a day plus his own room. Mr. Collett emphasized that the amount of $6,200 averaged out to only $39.74 per week for a three year period. Mr. Collett also included a claim in the amount of $1,500 for clothes that were provided to Son over the three-year period. Mr. Collett testified to other miscellaneous expenses he and his wife incurred while caring for Son, such as medical care, swimming lessons, haircuts, etc.

Mr. Collett acknowledged that he did not enter into a contractual arrangement with the Decedent to care for Son. According to Mr. Collett, when he did ask the Decedent for assistance in paying for something Son needed, the Decedent would say "I get 300-and-something dollars a month. I can't pay the damn thing."

On cross-examination, Mr. Collett stated that it was approximately 2½ years from the time Son came to live with them in the spring of 1991 until Son turned eighteen on November 12, 1993. Mr. Collett denied receiving monthly checks from the Decedent. After Son turned 18, he began receiving the social security checks that previously had been sent to the Decedent. Son continued

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[2] Mr. Collett also testified that the Decedent demanded that he return half the amount of the checks back to her. Mr. Collett stated that, for example, if the Decedent gave him a check for $300, the Decedent would demand that he give her back $150 in cash. Son's testimony supported that of Mr. Collett. The estate objected to this evidence at trial, claiming it violated the Dead Man's Statute, T.C.A. § 24-1-203 (2000). The trial court sustained the objection, stating that Mr. Collett could "testify as to what he did, not what she instructed him to do."

[3] Ms. Geraldine Wallick, a 40-year employee at Rockwood High School, was called as a witness at trial to verify the various amounts of school-related items contained in the Colletts' claim.

living with the Colletts for approximately one year after he turned 18. Mr. Collett stated that Son attended a community college for a short period of time before joining the Marines in the fall of 1994.

Son testified that he currently is employed as a medical assistant and x-ray technician. Son confirmed that he began living with the Colletts in the spring of 1991. He stayed with the Colletts "from that point on." Son acknowledged that the Colletts provided him three meals a day, which included the Colletts paying for his school lunches. Son stated that while he was living with the Colletts, they paid for his clothing, medical expenses, spending money on church mission trips, swimming lessons, family vacations to the beach, and various school expenses.

Son testified that he did receive the checks from the Decedent which had been admitted into evidence earlier in the trial. Son stated that he obtained information from the Social Security Administration showing the amount of the checks that were sent to the Decedent for Son's care. In 1991, the amount of the checks totaled $6,780. In 1992, the checks totaled $7,032, and in 1993 they totaled $7,236.[4] Son claimed he never directly received any of the checks prior to turning 18 and that the majority of the social security money was retained by the Decedent. Son acknowledged that in 1994, the Decedent gave him $2,650 to buy a car. Son stated that he had no knowledge of any agreement between the Decedent and the Colletts regarding the payment of Son's expenses.

The final witness was Linda Eaton, who was called as a witness on behalf of the estate. Eaton was formerly employed by the Decedent as a caregiver. Eaton prepared meals for the Decedent and eventually stayed with her at night and on weekends. Eaton could not recall exactly when she began working for the Decedent, although she did recall that Son then was already living with the Colletts. Eaton testified that she also helped the Decedent with her finances and would write checks for the Decedent's signature. Eaton identified checks that had been admitted into evidence which she wrote and were later signed by the Decedent. Eaton testified that the checks that were written to the Colletts were to assist with Son's "upkeep." Eaton went on to explain that a check was written to the Colletts each month for $200. The Colletts objected to this testimony based on the best evidence rule. The following discussion then ensued:

> MR. LEFFEW: Your honor, I object. If they have the check, they need to produce a copy of it. Her testimony is not the best evidence.
>
> MR. WILLIAMS: Well, Your Honor, we've already introduced the checks that we have copies of. There are checks that we don't have copies of. So that's . . . .
>
> MR. LEFFEW: Well, Your Honor, there are bank records that they could have endeavored to obtain.

[4] After Son turned 18, an additional $4,333 was sent directly to him in 1994.

> MR. WILLIAMS: Your Honor, this is 2007. These checks were written in 1991, '92, '93.
>
> THE COURT: I am going to sustain the objection. The best evidence would be the checks.

Eaton testified to her attempts to locate the missing checks. She said that the contents of the Decedent's house were inventoried and any copies of checks to the Colletts or Son that were found were introduced at trial. Eaton explained that in addition to the checks that were located, some check stubs were found. These check stubs purportedly showed that additional checks had been written to the Colletts. However, the check stubs do not indicate the amount of the check. Nevertheless, Eaton claimed that she "was sure" that the amount of each of those checks was $200. This testimony also was objected to, but on the basis of speculation. The objection was sustained. The trial court stated that "if all the checks were written for $200, it would be one thing, but they're not. They're in varying amounts."

At the close of the proof, the trial court announced its ruling from the bench. The court began by addressing the claim filed by the Colletts. The trial court pointed out that the claim in the court file indicates there was an unpaid balance of $5,862. The trial court concluded that if that unpaid balance amount was incorrect, the Colletts had more than sufficient time to correct their claim. Accordingly, the trial court concluded that the most the Colletts could receive was the unpaid balance of $5,862. The trial court then stated:

> And I believe Mr. Collett's testimony regarding the expenses that he paid on behalf of Jonathan McGlothin, who was living with him.
>
> And what the Court would find is the testimony was from the spring of 1991 until he graduated from high school in 1994. And no one could pin down when in the spring of '91 it was, so the Court's going to pick April of 1991.
>
> And I believe that the $12,000 figure that the Colletts claim they spent on him was probably a conservative amount. . . .
>
> There were some moneys that were paid to the Colletts. There were also some check stubs, Exhibit Number 7, that indicated that a check had been written to the Colletts, but it wasn't an actual check. And Ms. Eaton testified that they could not find all the records.
>
> So the Court is going to allow the claim of the Colletts in the amount of $5,862; is what the claim that the actual Court file indicates.
>
> Now, the Court also would take notice that Ms. McGlothin received moneys from Social Security on behalf of her son, Jonathan, as evidenced in Exhibit Number 4.

> And beginning in April and, again, I start in April of 1991, the Court has computed that in 1991, she received a total of $6,780. The Court divided that by 12 and came up with $565 per month, and that was for nine months that year, and that's $5,085. In 1992, Ms. McGlothin received $7,032. And during that whole time, the Court finds that, basically, Mr. Jonathan McGlothin was actually living with the Colletts. And in 1993, for 11 months of that year . . . she received money for 11 months out of that year. The total amount paid in 1993 was $7,236. I divided that by 12, came up with $603. Multiplied that times 11, came out to $6,633.
>
> And then added up $5,085 and $7,032 and $6,633; came up with a total of $18,750 that Ms. McGlothin received from Social Security that should have gone to support her son at the time that he was actually living with the Colletts.
>
> So what the Court is going to do, it's going to award Mr. Jonathan McGlothin – I took the $18,750, subtracted out the claim that the Colletts had, $5,862, then came up with [$12,888]. Then I subtracted out the $2,650 that Ms. McGlothin wrote a check, as exhibited by Exhibit Number 5, for a vehicle . . . and came up with an amount of $10,238.

The trial court then entered an order approving part of the Colletts' claim. According to the trial court's order:

> Regarding the issue of the amount of said claim, the Court finds that although the total of the items listed in said claim exceeds $12,000.00, said claim recites that the unpaid balance is $5,862.00. The Court further finds that should said statement of the unpaid balance be incorrect, the claim should have been corrected eleven years ago. Therefore, the Court **ORDERS, ADJUDGES AND DECREES** that the Estate of Laura Mae Eldridge McGlothin, Deceased, is indebted to the Claimants, Donald R. Collett and Anna F. Collett, in the amount of $5,862.00, only.

(Capitalization and bold print in original.)

The trial court entered a separate order approving Son's claim. The order pertaining to the Son's claim states as follows:

> The court, having heard the claim and the exceptions, the testimony of witnesses heard in open court, and the statements of counsel, is of [the] opinion that the claim is meritorious and that the exceptions are not well taken and should be disallowed, wherefore the claim ought

> to be allowed against the estate and paid from the monies in the estate accounts in the amount of Ten Thousand, Two Hundred and Thirty-Eight Dollars ($10,238.00).…

II.

The estate appeals raising the following issues, which we take verbatim from its brief:

> 1. The learned Trial Court erred in failing to sustain the objection made by the estate to evidence offered by both Don Collett and Jonathan McGlothin that they cashed checks received from Mrs. McGlothin but returned to her one-half of the money received, said evidence being in violation of the "Dead Man's Statute."
>
> 2. The learned Trial Court erred in sustaining the objection of the claimants under the best evidence rule to testimony offered by Mrs. Eaton concerning missing checks that were written to Mr. Collett.
>
> 3. There was insufficient evidence entered by claimants at trial to show that there was any valid debt owed by the decedent to either [the Colletts] or Jonathan McGlothin, and the learned Trial Court erred in allowing these claims in the amounts allowed or in any amount.

III.

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***Brooks v. Brooks***, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, with no presumption of correctness. *See* ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625, 628 (Tenn. 1999).

This court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard. ***Mercer v. Vanderbilt Univ., Inc.***, 134 S.W.3d 121, 131 (Tenn. 2004). A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. ***Id.***; ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). Reviewing courts will not disturb a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate court would not have chosen. ***See Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 708 n.7 (Tenn. Ct. App. 1999).

We begin by discussing where the money awarded to Son and the Colletts came from. The trial court determined that the social security funds that were sent to the Decedent actually belonged to Son. The relevant federal regulations are 20 C.F.R. §§ 404.350(a) (2008), 404.2010 (2008),

404.2035 (2008) and 404.2040(a) (2008). These regulations pertain to payment of social security benefits and provide, in relevant part, as follows:

> **§ 404.350 Who is entitled to child's benefits.**
>
> (a) General. You[5] are entitled to child's benefits on the earnings record of an insured person who is entitled to old-age or disability benefits or who has died if –
>
> (1) You are the insured person's child, based upon a relationship described in §§ 404.355 through 404.359;
>
> (2) You are dependent on the insured, as defined in §§ 404.360 through 404.365;
>
> (3) You apply;
>
> (4) You are unmarried; and
>
> (5) You are under age 18; you are 18 years old or older and have a disability that began before you became 22 years old; or you are 18 years or older and qualify for benefits as a full-time student as described in § 404.367.
>
> **§ 404.2010 When payment will be made to a representative payee.**
>
> (a) We pay benefits to a representative payee on behalf of a beneficiary 18 years old or older when it appears to us that this method of payment will be in the interest of the beneficiary. We do this if we have information that the beneficiary is –
>
> (1) Legally incompetent or mentally incapable of managing benefit payments; or
>
> (2) Physically incapable of managing or directing the management of his or her benefit payments.
>
> (b) Generally, if a beneficiary is under age 18, we will pay benefits to a representative payee. However, in certain situations, we will make direct payments to a beneficiary under age 18 who shows the ability to manage the benefits. . . .

[5] The "You" in this federal regulation, as applied to the facts of this case, would be Son.

§ 404.2035 What are the responsibilities of your representative payee?

A representative payee has a responsibility to –

(a) Use the benefits received on your behalf *only for your use and benefit* in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in your best interests;

* * *

(c) Treat any interest earned on the benefits as your property;

(d) Notify us of any event or change in your circumstances that will affect the amount of benefits you receive, your right to receive benefits, or how you receive them;

(e) Submit to us, upon our request, a written report accounting for the benefits received on your behalf, and make all supporting records available for review if requested by us; and

(f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities.

§ 404.2040 Use of benefit payments.

(a) Current maintenance.

(1) We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items. . . .

(Bold print in original; emphasis and footnote added.)

The above regulations leave little to debate. Pursuant to 20 C.F.R. § 404.350, Son was entitled to receive social security benefits after his adoptive father died. Because Son was under the age of eighteen, pursuant to 20 C.F.R. § 404.2010, the benefits were sent directly to his mother, the Decedent. Pursuant to 20 C.F.R. §§ 404.2035 and 404.2040, the Decedent had the affirmative responsibility to use *all* of those funds on Son's behalf for maintenance such as food, shelter, clothing, medical care, etc. When the trial court entered its judgment, all of the funds awarded to the Colletts and Son were funds from the social security benefits sent to Decedent on Son's behalf. Thus, the judgment awarded to the Colletts was not based on some general or state statutory

obligation of the Decedent to support her child. Rather, the judgment alluded to specific funds that, pursuant to federal law, the Decedent was required to use only toward the care of Son.

Before we address the specific issues raised by the Decedent's estate, we must point out that none of the exhibits entered at trial are included in the record on appeal. The trial court clearly relied on the exhibits and this Court is put at a significant disadvantage by not being able to evaluate these exhibits which obviously were an influence on the trial court in its final judgment. As the appellant, the Decedent's estate had the responsibility to ensure these crucial exhibits were part of the record on appeal. *See* ***In re M.L.D.***, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005) ("[U]nder Rule 24 of the Tennessee Rules of Appellate Procedure, the appellant has the duty to prepare the record which conveys a fair, accurate, and complete account of what transpired in the trial court regarding the issues which form the basis of the appeal.").

Exhibit 1 which was entered at trial, but which this Court does not have in the record, contains the checks given to the Colletts by the Decedent. The Colletts concede in their brief on appeal that the amount of cancelled checks to Mr. Collett total $2,650. According to the Colletts' brief: "Cancelled checks showed that while Jonathan was under 18 and residing with the Colletts, Laura Mae Eldridge McGlothin paid Donald R. Collett $2,650."

The first issue is whether the trial court erred when it permitted Mr. Collett and Son to testify that when checks were given to them by the Decedent, they returned one-half of the amount of those checks to her in cash. The estate argues the admission of this evidence violated the Dead Man's Statute, T.C.A. § 24-1-203 (2000). As far as we can determine without the necessary exhibits, even though this testimony was admitted, the Trial Court never increased either the judgment to the Colletts or the judgment to Son by an amount they allegedly returned to the Decedent after receiving one of the checks. Therefore, even if this testimony should have been excluded, it did not have any impact whatsoever on the final judgment, which renders the issue of the admissibility of this evidence moot.

The next issue is whether the trial court erred when it excluded, pursuant to the best evidence rule, testimony from Eaton about missing checks. Rules 1002 and 1004 of the Tennessee Rules of Evidence provide as follows:

> Rule 1002. Requirement of original. – To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature.
>
> Rule 1004. Admissibility of other evidence of contents. –
>
> The original is not required, and other evidence of a writing, recording, or photograph is admissible if –
>
> (1) Originals Lost or Destroyed. All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; or

> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing but does not produce the original at the hearing; or
>
> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

The majority of the estate's argument on appeal with regard to the admissibility of Eaton's testimony is as follows:

> Mrs. Eaton testified that a search had been made of Mrs. McGlothin's home for her bank records after her death and not all of the records could be found. (Vol. III, pp. 113, 114) Seeking those records from Mrs. McGlothin's bank is 2007 was obviously not an alternative.

Even though the estate claims that, in 2007, obtaining the records from the bank "was obviously not an alternative," the estate offered no testimony whatsoever from a representative of the bank that those records indeed were unavailable. Even more importantly, the estate offered no evidence that these records were unavailable or lost *in 1996*, which is when both claims were originally filed and the amount of payments made by the Decedent to the Colletts and Son was originally put at issue. Thus, to the extent these records could be considered lost or unavailable, it is likely attributable to the estate waiting eleven years after the claims were filed to make the unsupported assertion that these records could not be obtained from the bank in 2007. In addition, there was no evidence that these missing checks in an unknown amount ever were delivered to the Colletts or Son and negotiated by them. However, there was evidence presented by Mr. Collett and Son that these additional checks never were received or cashed. Accordingly, we conclude that the trial court did not abuse its discretion when it excluded this particular testimony from Eaton.

The estate's final issue is that there was insufficient evidence offered at trial to show there was any valid debt owed by the Decedent to either the Colletts or Son. We strongly disagree. There was overwhelming proof offered at trial that the Decedent received Son's social security checks and did not use most those funds for his "maintenance" as required by 20 C.F.R. § 404.2040, *supra*. We again point out the federal regulations quoted above which in no uncertain terms required the Decedent to use *all* of those funds for the maintenance of Son. The preponderance of the evidence quite clearly supports the trial court's decision to award judgments in favor of the Colletts and Son.

On appeal, the Colletts do not challenge the trial court's limitation of their award to $5,862, so we affirm that judgment. We do, however, find it appropriate to modify the award to Son. The trial court initially and correctly determined that $18,750 of Son's social security benefits were received by the Decedent. We conclude that the total amount of $18,750 should be reduced by: (1)

the $2,650 in payments made to the Colletts; (2) the $5,862 judgment awarded to the Colletts, and (3) the $2,650 payment made by the Decedent to Son which he then used to purchase a car. This would result in a total judgment to Son in the amount of $7,588. The judgment of the trial court is so modified.

Although not included in a statement of the issues in Son's brief on appeal, in the conclusion of his brief Son asks this Court to modify the trial court's award to include interest. Son does not cite us to anywhere in the record showing where he asked the trial court to award prejudgment interest, nor could we find such a request. This probably explains why the trial court failed to address prejudgment interest. Because Son's claimed entitlement to prejudgment interest was not first raised with the trial court, we consider this issue waived. *See* ***Simpson v. Frontier Community Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991) ("issues not raised in the trial court cannot be raised for the first time on appeal").

IV.

The judgment of the trial court, as modified, is affirmed and this cause is remanded to the trial court for enforcement of the trial court's judgment, as modified, and for collection of costs assessed below, all pursuant to applicable law. Exercising our discretion, we tax the costs on appeal to the appellant, the Estate of Laura Mae Eldridge McGlothin.

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CHARLES D. SUSANO, JR., JUDGE